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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROBERT M. RAPAPORT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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Robert M. Rapaport respectfully submits this reply brief in further support of his petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on January 5, 1983.

ARGUMENT

In its brief in opposition to the petitions for writs of certiorari,[1] the Government relies almost exclusively on the

1 A petition for certiorari was submitted by co-defendant Ingredient Technology Corporation, captioned *Ingredient Technology Corporation* v. *United States of America*, No. 82-1526, on which Mr. Rapaport also relies. Citations to that petition are in the form "ITC Pet"; citations to Mr. Rapaport's petition are in the form "R. Pet."

decision of the Court of Appeals and declines to address the issues raised in the petitions for certiorari. The Government takes this *ipse dixit* approach for an obvious reason: it has no adequate response to petitioners' arguments.[2]

As set forth in the petitions for certiorari, the Court of Appeals reached an illogical result in this action because it refused to permit evidence on the issue of intent—whether there was an intentional violation of a *known* legal duty—notwithstanding its acknowledgment that this was the applicable standard. It also incorrectly used a subjective test rather than an objective test in determining whether defendants had fair notice of the law. *No court has ever adopted the logic of the panel in this case; every decision which has addressed the issue has ruled differently.* The decision of the Court of Appeals undeniably created a conflict among the circuits, which the Second Circuit recognized and which only an Alice-in-Wonderland approach to the law could distinguish away.

A. The Government does not deny that there has *never* before been a criminal or civil determination of the propriety of including in LIFO inventory a commodity purchased subject to a resale understanding.[3] Nor does it dispute that the stand-

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2 Apparently for this reason, the Government also takes unusual liberties with the record. For example, it asserts (G. Br. 5, n.4) that "[d]uring the negotiation of the agreement Rapaport cautioned subordinates to keep the plans secret, lest the auditors disallow inclusion of the sugar in SuCrest's inventory (Tr. 154, 157, 226, 848)." Only one of the cited pages refers to Rapaport cautioning secrecy, and his comment related to talking to others in the sugar trade (Tr. 848). Moreover, the Government's witness testified that secrecy in sugar transactions was an industry practice to avoid loss of price advantage (Tr. 359, 981).

3 In this regard the court's observation in *AFL-CIO* v. *Federal Election Comm'n*, 628 F.2d 97 (D.C. Cir.), *cert. denied*, 449 U.S. 982 (1980) is particularly apt:

> We think it is obvious that in construction of any penal statute of which willfulness is an element, it is possible for the meaning of the statute to be clear to the mind of a trained judge, and still be less than clear enough to support a finding of willful violation. This is certainly so where, as here, the question . . . was hitherto untested by any sort of tribunal, and there was no regulation or even press release by the Commission, so far as cited to us." *Id.* at 101.

ard in criminal tax cases is that a defendant may not be convicted unless he has violated a "*known* legal duty." *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (emphasis added). Although the Government may prefer a different standard, even it cannot deny that the defendants could not have "known" that the Rionda transactions could not be included in inventory if the tax law on this point was undeveloped or unclear.

Nevertheless, as set forth in Rapaport's petition for certiorari, defendants were deprived of the opportunity to put in proof on this critical issue. The Fifth Circuit, sitting *en banc*, has concluded that it is reversible error to refuse to permit the defendant to demonstrate that the tax law was unclear, thereby negating the necessary intent to violate the law. In *United States* v. *Garber*, 607 F.2d 92 (5th Cir. 1979), as here, "[i]n effect, the court adopted the government's position that a tax was owing as a matter of law." *Id.* at 99. In its decision reversing the trial court the Fifth Circuit noted "[i]n a case such as this where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence tending to show lack of intent." *Id.*

The Government weakly attempts to distinguish the *Garber* case by arguing that the substantive tax law is clearer in the case presented here. Yet as demonstrated in Ingredient Technology Corporation's petition for certiorari, the Government's interpretation of the substantive tax law could not have been "known" during 1975 or 1976 by a tax expert, much less by a layman (ITC Pet. 11-16). The Government does not deny that Rapaport, a businessman with no legal training, devised a plan to protect the company's LIFO base that was virtually identical to commodity tax straddles, used by thousands of investors in the mid-1970's with the tacit (and often explicit) acquiescence of the IRS (R. Pet. 6-7). To conclude that he violated a "known" legal duty flies in the face of the tax law at the time and the evidence in this case.

Indeed, the Government studiously ignores the fact that *every* party who addressed the issue believed the substantive tax law was unclear or favored the taxpayer. *The trial court,*

responding to the argument that the Rionda transactions were permissible, stated "[y]ou might be entirely correct about that if this were a civil proceeding, but is not . . . . [i]n the civil area you might be correct" (Tr. 1815).[4] *The law firm of Milbank, Tweed, Hadley & McCloy* noted in a 1977 report that the legality of the transactions was "not free from dispute, and reasonable persons expert in the fields of tax law and accountancy may differ in their interpretation and conclusions" (R. Pet. 13). Furthermore, *two unchallenged experts in the area of federal income taxation*—including an attorney who was formerly in charge of tax cases in the Solicitor General's office—concluded that the Rionda transactions were permissible under the Code (Tr. 1874-1900, 1909-22), or at a minimum, that the Code and regulations thereunder did not provide the defendants with a basis for predicting that the courts would later reach a different conclusion (Tr. 1916-18).

Thus, as a matter of law, defendants could not have violated a "known legal duty" because the lack of clarity of the law prevented the duty from being known. *See James* v. *United States*, 366 U.S. 213, 221 (1961).

B. Moreover, the Government also ignores the fact that even the Second Circuit panel could not bring itself to state or suggest that the substantive tax law was clear or could be "known."[5] Rather, it observed that "surely the defendants

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4 The Government's suggestion that the full quotation changes the meaning or import of the trial court's observation is fundamentally misleading. The full quote simply reflects that the trial court was addressing defendants' argument that the absence of a written resale agreement negated any violation of the criminal law because absent a writing, SuCrest was not obligated to resell the sugar. Far from being a response to a "technical" argument, it went to the heart of the issue here. Indeed, the Government's own witness gave testimony that Rapaport believed that the transaction was allowable so long as no written agreement existed (Tr. 326-28).

5 Although the Government attempts to argue that the Court of Appeals applied an objective standard, it points only to the Court of Appeals' observation that the issuance of Revenue Ruling 79-188 "by no means signifies a lack of clarity in the law" (G. Br. 12). Neither in that observation nor in any other portion of the opinion did the panel hold that the law was, in fact, clear.

knew they were committing a wrongful act" (A-18) by looking to evidence—most of which was not even arguably attributable to Rapaport (R. Pet. 5; 17 n.14)—and inferring from it that the defendants subjectively knew that they were violating some duty. In short, the literally unprecedented rule enunciated by the panel is that the defendant need not have violated a "known legal duty" if he subjectively *thought* he was committing such a violation.

In addition, the panel's conclusion that the defendants must demonstrate that they relied on the uncertainty of the law is at odds with this Court's decision in *James* v. *United States*, *supra*,[6] and directly conflicts with the *en banc* decision in *United States* v. *Garber*, *supra*, 607 F.2d 92, in which the court was emphatic that subjective belief about the legality of the conduct is irrelevant where the law is vague and ambiguous. Notwithstanding the Government's attempt to portray the *Garber* decision as one that hinged on subjective intent, the Fifth Circuit stated with unmistakable clarity that its conclusion did not "depend on whether the defendant actually knew of the conflict." 607 F.2d at 98. *See also United States* v. *Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974).

The Government's contention that *Garber* is distinguishable from the instant case on the ground that there was proof in *Garber* of reliance on the uncertain law is both incorrect and a thinly veiled argument that the defendant must take the stand in order to present his defense of lack of specific intent to violate the law. As set forth in Mr. Rapaport's petition, sworn testimony from the Government's witness revealed that Mr. Rapaport believed that an oral resale agreement did not negate the accounting procedures used (Tr. 326-28).[7] Moreover, it

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6 In *James*, the majority reversed the conviction and remanded the case with directions to dismiss the indictment, declining to follow the suggestion of two dissenting Justices who argued that a remand was necessary for a jury to determine the factual question of whether the defendant actually relied on the uncertain law. 366 U.S. at 248.

7 Notwithstanding the Government's attempt to downplay this evidence, the testimony was neither changed nor recanted during re-direct examination by the Government (Tr. 430-31).

appears from the decision that the proof in *Garber, apart from defendant's own testimony*, "showed that those with whom she dealt advised her that they thought the proceeds were taxable." 607 F.2d at 100.

C. The Government's attempt to create the impression that there is no conflict among the Circuits represents either simple arrogance or wishful thinking. The Court of Appeals "agree[d] with the *Garber* dissent," and "declined to follow" the Fifth Circuit (A-19—A-20). Moreover, the *Garber* decision is simply not distinguishable from the case presented here—for reasons already demonstrated in the original petition (R. Pet. 12-16), and to which the Government does not deign to reply.

The Government has not denied and cannot deny that the issue of the admissibility of expert testimony in tax cases relating to the subject of wilfulness is an important one which is appearing with increasing frequency. Although the Government feebly attempts to distinguish *United States* v. *Baskes*, 687 F.2d 165 (7th Cir. 1981) and *United States* v. *Clardy*, 612 F.2d 1139 (9th Cir. 1980), on the ground that those courts did not consider the issue of whether it was error to exclude expert testimony, it cannot escape the law in the Fifth Circuit, and the clear statements of the Seventh and Ninth Circuits, that the courts will admit such expert testimony in tax cases as bearing on the issue of whether the duty could be "known."

CONCLUSION

The Government's arrogant attempt to salvage a conviction, despite the glaring gaps in logic and precedent that are obvious in the panel's opinion, cannot obscure the fundamental reasons why this case should be reviewed:

1. Other than this panel, no court in any jurisdiction or at any level of the federal system has *ever* adopted a subjective test for determining whether the substantive tax law was sufficiently unambiguous to form the basis of a criminal prosecution. Every court addressing the issue has rejected a subjective test.

2. Other than this panel, no court has *ever* upheld the exclusion of competent proof that the substantive tax law was unclear. Every court addressing the issue has rejected the logic of the panel's opinion.

There is an irreparable conflict among the circuits on an issue of increasingly frequent significance. This Court should review the case.

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